No. 16-1435

IN THE

# Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE, ET AL.,

*Petitioners,*

v.

JOE MANSKY, IN HIS OFFICIAL CAPACITY AS THE ELECTIONS MANAGER FOR RAMSEY COUNTY, ET AL.,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, AND THE LEAGUE OF WOMEN VOTERS MINNESOTA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICI CURIAE*[1]

The Brennan Center for Justice at NYU School of Law is a not-for-profit, non-partisan think tank and public interest law institute that seeks to improve systems of democracy and justice. It was founded in 1995 to honor the extraordinary contributions of Justice William J. Brennan, Jr. to American law and society. Through its Democracy Program, the Brennan Center seeks to bring the idea of representative self-government closer to reality, including through work to protect the right to vote and prevent intimidation, discrimination, and disruptions at the polls. The Brennan Center conducts empirical, qualitative, historic, and legal research on electoral practices, including on laws and regulations governing polling site activity. The Center has litigated cases involving regulation of polling sites, and submitted numerous *amicus* briefs in this Court on voting rights and other democracy issues.

The League of Women Voters of the United States ("League") is a nonpartisan, community-based organization that encourages Americans to participate actively in government and the electoral process. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League now has more than 150,000 members and supporters, and is organized in approximately 750 communities in every state. Since its founding, the League has led

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[1] Pursuant to Supreme Court Rule 37, *Amici Curiae* state that counsel for *Amici* authored this brief in its entirety. No person or entity other than *Amici* and their supporting organizations made a monetary contribution to the preparation of this brief. This brief does not purport to convey the position, if any, of the NYU School of Law. All parties have filed blanket consents to the filing of *amicus* briefs.

efforts to remove barriers that Americans face in registering to vote and casting a ballot.

The League of Women Voters Minnesota ("LWVM") is the state affiliate of the League. It is a nonpartisan political organization, which encourages informed and active participation in government. There are 35 local Leagues around the state. The LWVM has fought unlawful voter restrictions and believes that voting is a fundamental citizen right that must be guaranteed. The LWVM's local Leagues register voters, perform public education, conduct research, and engage with public officials on issues related to registration and voting.

## INTRODUCTION

At issue in this case is the constitutionality of a state law that regulates speech inside of polling places in order to protect the integrity and fairness of the voting process. Petitioners challenge a century-old portion of Minn. Stat. § 211B.11(1) that proscribes individuals from wearing "a political badge, political button, or other political insignia at or about the polling place on primary or election day."[2] While the word "political" is undefined, Minnesota campaign law provides elsewhere that "[a]n act is done for 'political purposes' when the act

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[2] Minnesota is far from the only state that regulates apparel inside of polling locations. *See, e.g.*, Cal. Elec. Code § 18370; *id.* § 319.5; Del. Code Ann. tit.15 § 4942; Ind. Code Ann. § 3-14-3-16; Kan. Stat. Ann. § 25-2430; Mont. Code Ann. § 13-35-211; Nev. Rev. Stat. § 293.740; N.H. Rev. Stat. Ann. § 659:43; N.J. Stat. Ann. § 19:34-19; N.Y. Elec. Law § 8-104; S.C. Code Ann. § 7-25-180; Tenn. Code Ann. § 2-7-111; Tex. Elec. Code Ann. § 61.010; Vt. Stat. Ann. tit.17 § 2508.

is intended or done to influence, directly or indirectly, voting at a primary or general election." Minn. Stat. § 211B.01(6).

In accordance with the law, election officials under the direction of Respondents prohibited Petitioners from wearing two types of apparel inside of polling locations: buttons with the message "Please I.D. Me," which were distributed as part of a volunteer "election integrity" effort and intended to encourage poll workers to check voter identification (despite Minnesota having no such requirement); and shirts bearing the name and various slogans of the Tea Party. *See, e.g.*, J.A. 40–42; J.A. 44–45; J.A. 47–51; J.A. 114–15. The record before the Court contains no examples of election officials in Minnesota excluding any other apparel from polling places pursuant to the challenged statute. After this case commenced, Respondents did issue an "election day policy," one prong of which suggests that they would bar any apparel "promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on)." App. I-1 to I-2. However, the record contains no evidence that the policy was applied other than to Petitioners' apparel.

*Amici* submit this brief to underscore that application of Minnesota's law to Petitioners was proper and indeed necessary to safeguard First Amendment-protected voting rights. Most importantly, the State has a compelling interest in preventing Petitioners from wearing buttons that falsely imply identification is required to vote, which would exacerbate the considerable confusion that already exists around this issue. The Court can easily address any other applications of the statute it

deems problematic without taking the extreme step of ruling the law itself facially unconstitutional.

## SUMMARY OF ARGUMENT

There are important First Amendment interests on both sides of this case. On one side is the right to engage in political expression, which Petitioners seek to exercise by wearing political messages into polling places. On the other side is the right to vote, which Respondents seek to safeguard by prohibiting political messages that interfere with the voting process. Both the right to free speech and the right to vote are critical to representative democracy in the United States.

In other words, this is not a case in which First Amendment rights must yield to some governmental purpose unrelated to the First Amendment. Limits on some types of speech in the polling place themselves can further important First Amendment interests, because the main purpose of a polling place is to facilitate a different First Amendment-protected right: the right to vote. To the extent that Minnesota's statute is reasonably targeted to protect the right to vote, it should be upheld.

The challenged statute's prohibition on political messages in the polling place safeguards the right to vote in two ways. First, as interpreted by the state, it prohibits apparel or signs about the voting process that are likely to sow confusion in polling places or to intimidate voters. The "Please I.D. Me" buttons that Petitioners were prevented from wearing are precisely the kinds of communications likely to disrupt the voting process. Extensive studies show that a large share of poll workers and voters nationwide misunderstand the voter identification rules in their

states. In Minnesota, identification is not required to vote (except under relatively rare circumstances required by federal law). Petitioners' "Please I.D. Me" buttons thus risked substantially exacerbating confusion over voter I.D. requirements by implying otherwise. Indeed, that was their intent. As the district court found, they were part of "an orchestrated effort to falsely intimate to voters in line at the polls that photo identification is required." *Minn. Majority v. Mansky*, 62 F. Supp. 3d 870, 876 (D. Minn. 2014) (*Mansky I*). This could have caused some voters without I.D. to leave the polling place without casting a ballot, or poll workers to improperly request identification. The First Amendment must not bar a state from preventing this kind of disruption of its voting process.

Second, the statute prohibits campaign paraphernalia, and paraphernalia closely tied to candidates and campaigns, inside polling places. This Court has already found that state laws barring campaign messages outside polling places serve the state's interest in protecting the voting process. It is reasonable for Minnesota to extend that ruling to similar messages *inside* a polling place, and to a group that, while not a political party itself, has the primary institutional objective of electing a certain type of Republican candidate to public office.[3]

These are the only actual applications of the statute that Petitioners challenge. Every other

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[3] Petitioners originally brought an equal protection claim alleging that they were singled out and treated differently from other similarly-situated persons. J.A. 85–87. That issue is not before the Court. No statement herein should be interpreted to endorse any effort to single out Petitioners or others for disparate treatment because of their beliefs.

example they raise is hypothetical. The question in a facial overbreadth challenge is whether a law prohibits enough protected speech such that its overbreadth is "*substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States v. Williams*, 553 U.S. 285, 292 (2008) (citations omitted). Here, application of the challenged statute to Petitioners was within the law's "plainly legitimate sweep." *See* Parts II and III(A), *infra*. Petitioners have not provided a single example of Minnesota officials prohibiting apparel in a polling place that should have been allowed. The mere possibility of some hypothetical application of the law in a way that would curtail protected speech is not enough to sustain an overbreadth challenge.

To the extent Petitioners' more sweeping hypotheticals have any credence, the problem is not with the statute itself, but with Respondents' broad interpretation of the statute memorialized in their election day policy—specifically the portion of that policy barring any apparel from a group with "recognizable political views." Striking down the law itself as unconstitutionally overbroad would be an unnecessary and disproportionate response to this very specific potential defect. To the extent the Court finds this interpretation problematic, a saving construction would preserve the core of the statute, including its goal of preventing voter intimidation and confusion. *See, e.g., Osborne v. Ohio*, 495 U.S. 103, 111–12 (1990). *Amici* urge the Court to adopt a targeted approach and avoiding striking down the statute in its entirety.

## ARGUMENT

### I. The Challenged Law is Justified to the Extent It Reasonably Protects the First Amendment Right to Vote

As Respondents persuasively argue, under this Court's precedents, the interior of a polling place is a nonpublic forum in which reasonable, viewpoint-neutral limits on speech are permissible. *See* Resp't Br. 25–39. In weighing the reasonableness of Minnesota's law, the Court should consider the extent to which any burden on speech imposed by that law is justified by other First Amendment interests.

The First Amendment guarantees freedom of both speech and association. This Court has long held that freedom of association includes "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively" in conjunction with their fellow citizens. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983). First Amendment protections for speech complement those for voting. Freedom of expression enables an "open market place" of ideas, which fosters an informed electorate capable of self-government. *Knox v. SEIU*, 567 U.S. 298, 307–09 (2012). And self-government in a representative democracy "is unimaginable without the ability of citizens to band together" at the ballot box to elect their chosen candidates. *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring) (quoting *Cal. Democratic Party v. Jones*, 530 U.S. 567,

574 (2000)). Without the ability to vote, the right to speak loses one of its most important purposes.[4]

The fact that speech and voting rights are complementary does not preclude them from coming into tension. The risk of such tension is especially high at a polling place, which is an enticing locale for political expression, including expression that could be disruptive to the voting process. Under these circumstances, "the First Amendment permits freedom of expression to yield...for the accommodation of another constitutional right"—that is, the right to vote. *Burson v. Freeman*, 504 U.S. 191, 213 (1992) (Kennedy, J., concurring). At least within the narrow confines of the polling place, the right to vote must be paramount, and states should be allowed to use reasonable means to safeguard it.

## II. Safeguarding Voting Rights is a Compelling Interest that Justifies Prohibiting the "Please I.D. Me" Buttons in Polling Locations

In this case, the State had a compelling interest in prohibiting Petitioners' "Please I.D. Me" buttons: protecting voters from confusion and intimidation. *See, e.g., Burson*, 504 U.S. at 199 (plurality op.) ("[T]his Court has concluded that a State has a

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[4] Of course, the First Amendment also protects individual expression and association as a means for self-fulfillment and creative expression. But the strongest motivation for guaranteeing these rights was to promote enlightened self-government within the framework of a representative democracy. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 15 (1976) ("[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.") (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

compelling interest in protecting voters from confusion and undue influence.") (citing *Eu v. San Francisco Cty. Democratic Central Comm.*, 489 U.S. 214, 223 (1989)); *id.* at 200 (recognizing "necessity of restricted areas in or around polling places"). *Burson* addressed electioneering bans, but activity beyond just electioneering can impact the fundamental right to vote. Efforts to mislead voters, poll workers, and others about the voting process, including voter identification requirements, also pose heightened concerns. That was the explicit goal of the "Please I.D. Me" buttons. These buttons did not simply convey a point of view; they called on poll workers to take action (check voter identification) that was improper under Minnesota law. *See Mansky I*, 62 F. Supp. 3d at 876.[5] The state was more than justified in prohibiting them to prevent voter confusion and intimidation and to ensure proper election administration.

### *A. There Is Already Widespread Confusion About When Identification is Required to Vote*

Political science research over the past decade consistently finds a widespread mistaken belief among both voters and poll workers that identification is required to vote in jurisdictions that have no such requirement. Some of that confusion stems from poll workers who simply do not know the law. Voters themselves also are frequently

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[5] In fact, Minnesota voters decisively rejected an effort to insert such a requirement into the state's constitution. *See* Minn. State Leg., *State Constitutional Amendments Considered*, https://goo.gl/VveoV2 (last visited Feb. 2, 2018) (showing rejection of constitutional amendment "[t]o require all voters to present valid photo identification to vote" by margin of more than 170,000 votes).

misinformed. Both poll worker and voter confusion disproportionately affects non-white voters.

1. Poll worker confusion

Poll worker confusion over voter identification requirements is well documented in recent scholarship. For example, a survey of over 10,000 voters in the 2012 presidential election found that "12% of voters in non-identification states were still required to show photo identification in order to vote." *See* Charles Stewart III, *Voter ID: Who Has Them? Who Shows Them?*, 66 OKLA. L. REV. 21, 47 (2017). A poll worker survey analyzing New Mexico's November 2008 election found that poll workers "tend to rely on their own attitudes and beliefs rather than the law and their training." Lonna Rae Atkeson et al., *Who Asks For Voter Identification? Explaining Poll-Worker Discretion*, 76 J. POL. 944, 954 (2014). That survey also found that "some poll workers ignore the law and instead rely on their feelings and attitudes about the way voter identification should be administered." *Id.* Unsurprisingly, the study found evidence of poll workers asking voters to show a form of identification, despite that being "contrary to New Mexico election law," with alarming regularity: more than a third of survey respondents reported having asked for identification "very often" or "somewhat often." *Id.* at 950.

Another study that examined the 2006 general election and the 2008 presidential "Super Tuesday" primaries similarly found inconsistent poll worker requests for voter identification due to ignorance of the law. *See* Stephen Ansolabehere, *Effects of Identification Requirements on Voting*, 42 PS: POL. SCI. & POL. 127 (2009). The study flatly concluded that "poll workers commonly ask voters for photo

identification, even in places where they are not allowed to." *Id.* at 128.

Moreover, the study's survey results revealed the troubling trend that "poll workers do not administer [voter identification] procedure[s] fairly or without regard to race." *Id.*[6] A study examining the 2012 presidential election similarly found that in jurisdictions where identification was not required under applicable state law, "African American and Hispanic voters were much more likely to be required to show identification than were white voters—1.6 times more likely, in the case of black voters, and more than 2.5 times more likely in the case of Hispanics." *See* Stewart, *supra*, at 48.

2. Voter Confusion

When election officials themselves are unsure about voter identification requirements, it should come as little surprise that there is substantial confusion among voters about whether identification is needed to vote. Indeed, a report on the 2014 election from the Lawyers' Committee for Civil Rights Under Law found that "[u]ncertainty about voter ID requirements was exacerbated by poll workers who incorrectly asked voters for ID or who asked voters for a form of ID that was not required in their state." Law. Committee for Civ. Rts. Under Law, *The 2014 Election Protection Report: Democracy Should Not Be This Hard* 35 (2015), *available at* https://goo.gl/j1g7ge.

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[6] The 2008 Super Tuesday primary surveys revealed that 53% of white voters reported being asked to show identification at the polls, while 58% of Hispanic voters and 73% of African American voters reported the same. Those racial disparities "persisted upon holding constant income, education, party identification, age, region, state laws, and other factors." *Id.* (citation omitted).

That group's analysis of calls received by the Election Protection national voter hotline in the 2016 election found that voter confusion over identification requirements was a top barrier to voting. Law. Committee for Civ. Rts. Under Law, *Striving to Protect Our Vote in 2016* at 1 (2016), *available at* https://goo.gl/ne3kQa.

In the months preceding the 2016 general election, the Pew Research Center conducted a national survey to gauge voters' knowledge of voter identification requirements. The results were striking. Nearly 40% of voters "living in states with no identification requirement incorrectly believe that they will be required to show identification prior to voting." Bradley Jones, *Many Americans Unaware of Their States' Voter ID Laws*, Pew Research Center, (Oct. 24, 2016), https://goo.gl/pXzuZy. Here, as well, there was a substantial racial disparity in the results, with African-American and Hispanic voters more likely to incorrectly believe that identification was required. 31% of white voters in states with no voter identification requirement incorrectly believed that identification was required, compared to 51% of African-American and 53% of Hispanic voters. *See id.*

Widespread confusion was found even among voters in states that have an identification requirement: 22% of such voters did not know that identification would be needed to vote. *Id.* Another study assessing the impact of Wisconsin's voter identification law on turnout in the 2016 election found that roughly a third of voters "had not seen information about the voter ID requirements during the campaign," implying that a significant number of voters were in the dark about the law. Kenneth R. Mayer & Michael G. DeCrescenzo, *Questions and*

*Answers about the Voter ID Study: Estimating the Effect of Voter ID on Nonvoters in Wisconsin in the 2016 Presidential Election*, Elections Res. Center at the Univ. of Wisc., (Sept. 25, 2017), *available at* https://goo.gl/FbMX95.[7] Press reports have also captured voters' misunderstanding of identification requirements.[8]

In short, voter identification rules already sow considerable confusion that can impact the ability of many voters, and especially voters of color, to cast their ballots.

### *B. The "Please I.D. Me" Buttons Likely Would Have Exacerbated Confusion, Contributed to Maladministration of the Voting Process, and Deterred Eligible Voters from Casting Ballots*

Given voter uncertainty about identification requirements and the ignorance of many poll workers, the "Please I.D. Me" buttons—which falsely implied that identification was required to vote—were likely to exacerbate confusion among voters and poll

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[7] *See also* Kenneth R. Mayer & Michael G. DeCrescenzo, *Supporting Information: Estimating the Effect of Voter ID on Nonvoters in Wisconsin in the 2016 Presidential Election*, Elections Res. Center at the Univ. of Wisc., (Sept. 25, 2017), *available at* https://goo.gl/SVsctZ.

[8] *See, e.g.*, Patrick Marley, *Wisconsin voters are confused over ID law, professor tells election officials*, Milwaukee Journal Sentinel ,Dec. 12, 2017, *available at* https://goo.gl/jm4NVq; Jessica Huseman, *Texas Voter ID Law Led to Fears and Failures in 2016 Election*, ProPublica, May 2, 2017 https://goo.gl/rBjvZB; Rebecca Beitsch, *New voter ID rules, other election changes could cause confusion*, PBS News Hour, Oct. 19, 2016, https://goo.gl/Mia4o1; Adam Brandolph, *Voters report problems with long lines, confusion over voter ID law*, Pittsburgh Tribune-Review, Nov. 6, 2012, *available at* https://goo.gl/qEN8eK.

workers. This, in turn, could have deterred significant numbers of eligible voters from exercising their fundamental rights at the polls.

In fact, that seems to have been the point. The record shows that the "Please I.D. Me" buttons were part of a broader "election integrity" effort intended to keep individuals whom the participants perceived as ineligible from voting. This was no secret. As the website of the coalition behind that effort explained:

> While Minnesota does not require an individual to show an ID, let's act like it does. This simple act of showing an ID will likely result in a spontaneous reaction from others in line behind you to show their ID as well. Any person in line thinking about committing voter impersonation will likely be dissuaded from doing so.

J.A. 104–05. The reality is that in-person voter fraud is vanishingly rare. *See* Philip Bump, *There Have Been Just Four Documented Cases of Voter Fraud in the 2016 Election*, Wash. Post, Dec. 1, 2016, https://goo.gl/HGuVKo; Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents out of 1 Billion Ballots Cast*, Wash. Post, Aug. 6, 2014, https://goo.gl/fUe4GY; Justin Levitt, Brennan Ctr. for Justice, *The Truth About Voter Fraud* (2007), *available at* https://goo.gl/YswC6J; *Myth of Voter Fraud*, Brennan Ctr. for Justice, https://goo.gl/gKDmGv (last visited Feb 11, 2018) (collecting studies).[9] In effect, the

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[9] *See also, e.g, Veasey v. Abbott*, 830 F.3d 216, 238 (5th Cir. 2016) (en banc) (noting record of only two convictions for in-person voter fraud out of 20 million votes cast in Texas), *cert. denied* 137

primary people that such efforts would have likely dissuaded from voting would have been eligible voters lacking identification, which, as noted, Minnesota does not require to vote.

More broadly, there is evidence that such "election integrity" efforts foster an intimidating environment that drives eligible voters away from the polls. An exhaustive review of ballot security operations by the Republican National Committee from the 1980s through 2008 found multiple instances of voter intimidation and discriminatory behavior. *Democratic Nat. Comm. v. Republican Nat. Comm.*, 673 F.3d 192, 196-99 (3d Cir. 2012) ("DNC v. RNC"), *cert. denied*, 568 U.S. 1138 (2013). Other reviews of volunteer "ballot security" operations,[10] including efforts to challenge to voters at the polls,[11] demonstrate the risk

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S.Ct. 612 (2017); *Democratic Nat. Comm. v. Republican Nat. Comm.*, 673 F.3d 192, 212 (3d Cir. 2012) ("*DNC v. RNC*") (noting rarity of of in-person fraud), *cert. denied*, 568 U.S. 1138 (2013); *see also Frank v. Walker*, 773 F.3d 783, 788 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing en banc) ("Voter impersonation fraud... is by all accounts a tiny subset, a tiny problem, and a mere fig leaf for efforts to disenfranchise voters...."); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 194 (2008) (acknowledging "no evidence of any [in-person] fraud actually occurring in Indiana at any time in its history").

[10] *See* Wendy Weiser & Adam Gitlin, Brennan Ctr. for Justice, *Dangers of "Ballot Security" Operations: Preventing Intimidation, Discrimination, and Disruption* 4 (2016), *available at* https://goo.gl/dLwzvd ("In addition to interfering with the rights of targeted voters, ['ballot security' operations] risk[] disrupting polling places and creating longer lines.").

[11] *See* Nicolas Riley, Brennan Ctr. for Justice, *Voter Challengers* 11 (2012), *available at* https://goo.gl/93DMXk ("When challengers become overly aggressive, they can disrupt the voting process, cause delays, and wreak chaos inside the polls on Election Day. . . . Even when challengers are not deliberately

that disruptive behavior in or around the polling place could keep eligible voters from voting. Not only do such disruptions intimidate voters, they also contribute to the problem of long lines that make the voting process more time-consuming and burdensome. A study of the 2008 election found that roughly a fifth of non-voters cited long lines as a factor in their decision not to vote. R. Michael Alvarez, Stephen Alsolabehere, Adam Berinsky, Gabriel Lenz, Charles Stewart III & Thad Hall, *2008 Survey of the Performance of American Elections: Final Report* 36 (2009), *available at* https://goo.gl/bJW4mQ.

Petitioners are, of course, entitled to advocate for their views as to how voting should be conducted; however, the State has a compelling interest in keeping that advocacy out of the polling place to ensure orderly voting free of disruption and intimidation.

## III. Respondents' Interpretation of Minnesota Law to Bar Tea Party Apparel Inside the Polling Place Does Not Render the Law Unconstitutional

Apart from the "Please I.D. Me" buttons, the only other apparel that Petitioners sought to wear, and that Respondents barred inside polling locations, bore the name and various slogans association with the Tea Party. *See, e.g.*, J.A. 72 ¶ 46 - 47; J.A. 109 ¶ 11; J.A. 114 ¶ 5. Amici take no position on the merits of such a restriction as a matter of policy, but it was reasonable and therefore constitutional under longstanding precedents governing restrictions on

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disruptive, their actions can nevertheless interfere with the voting process at the polls.").

political apparel inside polling locations. To the extent the Court is concerned about potentially more sweeping applications of Minnesota's law, it is unnecessary to declare the law facially unconstitutional to address those concerns.

### *A. Well-Established Precedents Permit the State to Prohibit Tea Party Apparel Inside Polling Locations*

It is well-established that states may restrict electioneering in and around polling places. *E.g.*, *Burson*, 504 U.S. at 214 (Scalia, J., concurring in the judgment) ("[R]estrictions on speech around polling places on election day are as venerable a part of the American tradition as the secret ballot."). Indeed, all fifty states and the District of Columbia do so to some extent; many of these laws, like Minnesota's, date back more than a century. *See, e.g.*, Michael Odell Walker, *"Don't Show Them Where To Click And Vote:" An Assessment of Electioneering Law in the United States as a Consideration in Implementing Internet Voting Regimes*, 91 KY. L.J. 715, 747 (2002) (compiling electioneering statutes); Resp't Br. 4-6. As in *Burson* and its progeny, moreover, electioneering restrictions may include limits on the passive display of candidate and party paraphernalia, including clothing. *See, e.g.*, *Burson*, 504 U.S. at 210–11 (plurality op.); *Marlin v. D.C. Bd. of Elections & Ethics*, 236 F.3d 716 (D.C. Cir. 2001); *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993).

The Tea Party, although not technically a political party, is nonetheless a political movement primarily directed toward electing candidates to political office. Its major goal, as expressed by its own leaders in Minnesota and elsewhere, is to elect a certain type of

conservative, anti-establishment Republican. *See, e.g.*, Congresswoman Michele Bachmann, Right Online Conference Keynote Address (July 23, 2010), *available at* https://goo.gl/qBvEhe ("We are knocking on doors, we are dropping literature, we are organizing phone banks, because we are going to take back this country the first Tuesday of November."); Rand Paul, THE TEA PARTY GOES TO WASHINGTON 4 (2011) ("The national Republican Party, the Kentucky establishment, K Street and virtually every power broker in Washington, D.C., had all lined up to oppose me like no other candidate running in 2010. The entire political establishment had my primary opponent's back. Luckily, the Tea Party had mine."); Jenny Beth Martin, *While MSM Proclaims Its Death, the Tea Party Builds an Army*, Breitbart (May 9, 2012), https://goo.gl/aZx8Qz ("After his defeat at the hands of the Tea Party, soon-to-be former Senator Dick Lugar can tell you, the Tea Party is not only alive but they are also organized to fight, and win....The next big battle ground in which the Tea Party will exercise its more refined skills is the June 5 recall election in Wisconsin."); *see also* Vanessa Williamson, Theda Skocpol & John Coggin, *The Tea Party and the Remaking of Republican Conservatism*, 9 PERSPECTIVES ON POL. J. 25, 35 (Mar. 2011), *available at* https://goo.gl/YUNyJv (describing Tea Party efforts to reshape the Republican Party).

At the time this case arose, there was even a Tea Party Caucus in the U.S. House of Representatives. Its members were all Republicans, and Congresswoman Michele Bachmann of Minnesota was its chair. A study that examined voting behavior in the 111th and 112th Congresses found that the Tea Party had "party like" effects in Congress. Jordan M. Ragusa & Anthony Gaspar, *Where's the Tea Party? An*

*Examination of the Tea Party's Voting Behavior in the House of Representatives*, 69(2) POL. RES. Q. 361, 369 (2016).

In short, while Tea Party members (like mainstream Republicans and Democrats) clearly are motivated by a variety of issues, the Tea Party as a brand is expressly partisan and focused primarily on winning elections. There is nothing wrong with that. But it is at most a minor extension of existing doctrine to hold that, within the narrow confines of the polling place, a state can restrict Tea Party apparel (and that of its progressive equivalents like Our Revolution associated with the Democratic Party) to the same degree as that of candidates and parties. Respondents' interpretation of their statute to do so was not unconstitutional.

### *B. Any Concerns About the Scope of Respondents' Interpretation of the Statute Call for Targeted Solutions and not the "Strong Medicine" of Unconstitutional Overbreadth*

Just because the First Amendment allows Minnesota to regulate speech in non-public forums does not mean that the State has carte blanche to restrict any speech it wants inside a polling place. But, as explained above, that is not this case.

The overbreadth doctrine is "strong medicine," and has a tendency "to summon forth an endless stream of fanciful hypotheticals." *Williams*, 553 U.S. at 301 (Scalia, J., concurring). Yet hypotheticals alone do not suffice to declare an otherwise valid statute facially overbroad and unconstitutional. *See, e.g., id.* at 301; *Members of the City Council of the City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) ("[T]he mere fact that one can conceive of some

impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.").

To the extent Petitioners' hypotheticals have any credence, it is due not to the statute itself but to Respondents' interpretation of it, specifically the prong of their election day policy barring all apparel "promoting a group with recognizable political views . . . ." App. I-1 to I-2. But the mere existence of that policy and off-the-cuff statements from officials also is generally insufficient to sustain an overbreadth challenge without any evidence of protected speech having been barred. *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 617–18 (1973) (rejecting overbreadth challenge where relevant official interpretation of statute "may be susceptible of some . . . improper applications" but evidence of actual violations was lacking); *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (interpretation that gave officials "unfettered discretion" to deny permission to demonstrate or leaflet on governmental property would be insufficient basis to find underlying written policy unconstitutionally overbroad absent evidence of actual First Amendment violations).

The absence of any documented unconstitutional applications in the record is especially relevant where, as here, the law in question itself safeguards important First Amendment interests, and is also readily suspectible to a narrower interpretation that would obviate any constitutional infirmities.

If the Court feels Respondents have gone too far, there are less extreme alternatives to ruling the statute facially overbroad and unconstitutional. The Court can, for example, uphold the statute without endorsing the full scope of the election day policy,

leaving future plaintiffs who wish to wear issue group apparel from organizations like the NRA or the Sierra Club free to bring as-applied challenges.

Alternatively, the statute is readily susceptible to a limiting construction that would preserve its core goals and its constitutionality. This Court follows a "cardinal principle" that, before finding a statute unconstitutionality overbroad, it "will first ascertain whether a construction is fairly possible that will contain the statute within constitutional bounds." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 78 (1997) (internal quotations and elipses omitted). It routinely applies such limiting constructions to federal statutes. *See, e.g., Skilling v. United States*, 561 U.S. 358, 405 (2010) ("It has long been our practice, however, before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction.") (citations omitted); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 588 (1988) (limiting scope of 29 U.S.C. § 158(b)(4) to avoid "serious constitutional questions"). When confronted with a state statute that has not been interpreted, the Court has typically availed itself of state certification procedures to obtain an authoritative ruling from the state's highest court before ruling on the statute's constitutionality. *Arizonanas for Official English*, 520 U.S. at 79.

In this case, the word "political" in the challenged portion of Minn. Stat. § 211B.11(1) could be construed to extend only to apparel that any reasonable person would view as electoral advocacy (including advocacy for candidates, parties, and ballot questions) and any other apparel designed to confuse or intimidate voters or poll workers at the time of voting. *Cf., e.g., Skilling*,

561 U.S. at 408-09 (limiting scope of "honest services fraud" under 18 U.S.C. § 1346). This construction would admittedly invalidate Respondents' election day policy to the extent it prohibits the apparel of *any* group with "recognizable political views," including issue-focused organizations like the NRA or the Sierra Club. However, it would still be consistent with the definition of "political purposes" in Minn. Stat. § 211B.11(6), and would continue to further the statute's core goal of ensuring a smooth voting process free from intimidation or confusion. Resp't Br. 2; *see also id.* at 56-58.[12]

In sum, the Court need not embrace every possible application of Minnesota's statute or every aspect of Respondents' election day policy to uphold the law. However the Court rules, it should leave the State free to pursue the compelling voter protection interests at the heart of this case.

## CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

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[12] Amici respectfully disagree with Petitioners and Amici who argue that the statute is not susceptible to such a limiting construction. To the contrary, such a limiting construction—defining "political" in the law to reach electoral advocacy and efforts to confuse or intimidate voters—would be in accord with both the statute's text and its overriding purpose to serve the State's interest in protecting voters from undue confusion and intimidation.

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